

# A Champion for Children and Young People: The Work and Impact of the Commissioner for Children and Young People in Scotland

By Tam Baillie

## Introduction

On December 16, 1991, the government of the United Kingdom ratified the United Nations (UN) Convention on the Rights of the Child (CRC). With all the world's governments bar two (Somalia and the United States) now signed up to its provisions, the convention is the most widely ratified human rights treaty around. Many state parties have moved to establish specialist national human rights institutions to oversee the implementation of the CRC in their respective domestic contexts. This most frequently takes the shape of independent commissioners, commissions, or ombudspersons for children and young people, established by law and with a varying range of statutory powers at their disposal.

As the debate continues in the United States as to whether or not to ratify the CRC, this article presents a Scottish perspective on the experience and explores the benefits of setting up an independent watchdog for children's rights.

While a comparative study of the different arrangements state parties entered into to promote and safeguard the rights of children and young people and to monitor the implementation of the CRC would be of great benefit to everyone with an interest in making rights a reality for children and young people, this article is more limited in scope. It will give a brief overview of the rights enshrined in the CRC before setting out the legislative basis and powers of the office of Scotland's Commissioner for Children and Young People as well as some of the thinking behind Scotland's approach to the matter. It concludes by giving some examples of the commissioner's work and the impact that the two officeholders have been able to make since the office's inception in 2004.

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## The CRC

The CRC is an international human rights treaty that was approved by the UN General Assembly on November 20, 1989, and entered into force after attracting the 20th notice of ratification, on September 2, 1990. It comprises 54 articles, enshrining a range of civil and political as well as social, economic, and cultural rights into international law.<sup>1</sup> Children's human rights protected by the CRC include a set of general principles, including that the best interest of the child should be a primary consideration in all decisions that affect him or her (Article 3), that the child should be protected against all forms of discrimination (Article 2), and that the child has a right to hold and express views and have those views taken into account in all decisions that affect his or her life (Article 12). Other rights protected under the CRC relate to education, health, justice, adequate standards of living, protection from abuse and neglect, and other matters.

The UN Committee on the Rights of the Child is the international group of experts that oversees compliance with and implementation of the provisions of the CRC by state parties. It does so by examining periodic state party reports, and by scrutinizing those reports with the help of alternative reports and verbal evidence given by national and international civil society institutions, such as nongovernmental organizations and national human rights institutions specializing in children's rights. Further, the Committee from time to time issues General Comments to support the interpretation and implementation of the provisions of the Convention by state parties.<sup>2</sup>

The United Kingdom's Human Rights Act 1998 made the key articles of the European Convention on Human Rights of 1950 (ECHR) directly applicable to U.K. public authorities and justiciable in the domestic courts. In Scotland, the ECHR also applies directly to the devolved Parliament, which under the terms of the Scotland Act 1998 has no power to pass legislation that would constitute a breach of the ECHR. The UNCRC has not (yet) been transposed into domestic law in this manner, and despite the fact that it is increasingly referred to in ECHR jurisprudence, both domestically and in the European Court of Human Rights, it does not have force of law in the same way. This does not, however, take away from the fact that all levels of government in the United Kingdom are bound by the CRC's provisions, including the U.K. Government, the Scottish Government, local government, and other bodies that exercise certain public functions.

## Scotland's Commissioner for Children and Young People

The Scottish Parliament was established through the Scotland Act 1998. It has legislative powers concerning a wide range of policy areas, including (but not limited to) education and children's services, health, justice, policing, and family law. The U.K. Parliament has "reserved" competence over such matters as defense, foreign affairs, immigration, and the control of drugs. The office of Scotland's Commissioner for Children and Young People was set up under the terms of the

Commissioner for Children and Young People (Scotland) Act 2003 (the “2003 Act”),<sup>3</sup> an Act of the Scottish Parliament passed in its first term of operation after being reconvened following a transfer of power as part of the Scottish devolution settlement.

Though received largely positively across the Scottish Parliament, the initiative to create an independent children’s commissioner in Scotland did not originate there. Rather, it was a 10-year campaign by children’s organizations and others that brought the case for a commissioner to the Parliament and caused its (then) Education, Culture and Sport Committee to embark on an “Inquiry into the Need for a Children’s Commissioner in Scotland.”<sup>4</sup> Members of the committee took evidence from children and young people, as well as a wide range of organizations working with and for children and young people across Scotland, and others with an interest in the matters affecting them.

Members of the Scottish Parliament (MSPs) debated the need to promote and safeguard the rights of children and young people in Scotland, along with areas in which a commissioner could add value to the work of others. They further debated the powers that a commissioner would have, and international examples and experiences of setting up children’s commissioners’ offices and the contribution they can make to the advancement of children’s rights domestically. The setting up of the Children’s Commissioner for Wales in 2001 and the emerging thinking on the establishment of a similar office in Northern Ireland were also considered by the committee, not least because of the increasingly complex distribution of powers between the U.K. level and the three devolved legislatures and administrations.

In its report on the inquiry, the committee recommended the creation of a commissioner for children and young people for Scotland, with a range of statutory powers and substantial legal protections for the office’s independence. It is worth noting that the report proposed a commissioner as opposed to a commission. This has the effect of creating a highly personalized position to which children and young people can relate. The recommendations were to be given effect through a Committee Bill, and a special parliamentary committee was set up to take forward the bill, which was drafted on the instruction of the Scottish Parliament’s Non-Executive Bills Unit, within the parameters of the inquiry report’s recommendations.\*

*\*Under the Scottish Parliament’s Standing Orders, a committee of the Parliament may, with the approval of the Parliament, introduce a Committee Bill. The Scottish Parliament’s Non-Executive Bills Unit supports individual MSPs and committees in drafting Private Member’s Bills and Committee Bills.*

## The Case for a Children’s Commissioner

In 2002, the UN Committee on the Rights of the Child issued guidance in *The Role of Independent National Human Rights Institutions [NHRIs] in the Promotion and Protection of the Rights of the Child*.<sup>5</sup> Considering the particular vulnerabilities of children, and their being silenced in mainstream “adult” forums and decision making, the situation called for the establishment by every state party of an independent statutory office charged with promoting and safeguarding the rights of children and young people – based on the principles of the CRC and other human rights instruments that pertain to children:

While adults and children alike need independent NHRIs to protect their human rights, additional justifications exist for ensuring that children’s human rights are given special attention. These include the facts that children’s developmental state makes them particularly vulnerable to human rights violations; their opinions are still rarely taken into account; most children have no vote and cannot play a meaningful role in the political process that determines Governments’ response to human rights; children encounter significant problems in using the judicial system to protect their rights or to seek remedies for violations of their rights; and children’s access to organisations that may protect their rights is generally limited.<sup>6</sup>

Independence from government, security of tenure, and funding that is uncontested by adult interests guarantee commissioners an unparalleled ability to take up issues brought to them by children, or by others who are concerned with the rights and well-being of children – regardless of how unpopular a topic or group (however defined) may be among the general population. This allows the commissioner to raise the profile of the rights of children and young people in that context, without fear or favor. A well-run and well-respected children’s commissioner’s office can speak with authority on the issues affecting children and young people and their rights and achieve tangible results in terms of changes to public policy and real impacts on children’s and young people’s lives. The commissioner has a duty under the 2003 Act to pay particular attention to groups of children and young people who “do not have other adequate means [to] make their views known”<sup>7</sup> and have their rights respected. This can encompass a wide range of groups, for example, asylum-seeking children, gypsy-traveler children, young people in conflict with the law, and many other similarly excluded groups. The combination of a statutory role, the status and reputation of the office, and high-quality outputs enables the commissioner to ensure that the issues faced by those children and groups of children are effectively highlighted to decision makers and put on the political agenda.

## Functions and Powers

The commissioner's general function is to promote and safeguard the rights of children and young people in Scotland. The 2003 Act offers useful guidance as to the work Parliament expects the commissioner to undertake in pursuance of his or her overall functions; it specifies, among other things, that the commissioner is to "keep under review the law, policy and practice relating to the rights of children and young people with a view to assessing [their] adequacy," undertake and commission research, and promote good practice by service providers.<sup>8</sup>

The commissioner further has a duty to "have regard to any relevant provisions of the [CRC]" in exercising his or her functions, to raise awareness of the convention, and to involve children and young people, and organizations that work with them, in the office's work.<sup>9</sup> Finally, the commissioner has the power to investigate any service provider, regardless of whether it is in the public, private, or voluntary sector, as to the extent to which it considers the "rights, interests and views of children and young people in making decisions or taking actions that affect those children and young people."<sup>10</sup> As part of such an investigation, the commissioner can compel documents and witnesses and take evidence under oath; refusal to appear, answer questions, or release documents to the commissioner in the course of an investigation is an offense.<sup>11</sup> It is worth noting that the power of investigation has not been used to date.

In setting up the commissioner's office, Parliament chose to align the age range of the commissioner's remit with the CRC – that is, applying to all children under the age of 18 years. However, MSPs recognized the particular vulnerabilities of children and young people in the care of the state and the difficulties they often face when leaving care; the commissioner's remit therefore extends to young people up to 21 in the case of children who have ever been in the care of the state. There has been some debate as to whether this should be replicated with regard to other groups of young people who are known to struggle with transitioning into adult services and systems, such as disabled young people.

The 2003 Act set up the commissioner's office as a public body that is responsible directly to the Scottish Parliament, with no powers of direction vested in Scottish cabinet ministers, MSPs, or anyone else. The Scottish Parliamentary Corporate Body has a degree of power and control with respect to the commissioner's financial dealings, to ensure proper accountability for public money, and can make certain provisions relating to staffing levels, budgetary processes, and reporting on the commissioner's activities and outputs.

There are, however, explicit limits on the activities of the commissioner in pursuance of his or her functions, and the current Scottish setup does not meet the international standards set out by the UN Committee in its 2002 *General Comment*, or indeed the United Nations' *Principles relating to the Status of National Institutions*, commonly known as the "Paris Principles."<sup>12</sup> For example,

the office has no remit to take up individual complaints from children or others and advocate on their behalf, initiate or intervene in legal proceedings, or investigate matters for which the U.K. Parliament has legislative competence,<sup>13</sup> though there are significant gray areas with regard to the latter point.

### Scotland's Commissioner: Work and Impact to Date

Scotland's first Commissioner for Children and Young People, Kathleen Marshall, took office in 2004. Together with her staff team, she consulted with around 16,000 children and young people from across Scotland to establish their priorities as a basis for some of the office's work. The findings of the consultation, work with children's organizations and others, and scoping work of activities on key children's rights issues at the time informed her office's *Safe, Active, Happy Action Plan*, which shaped much of the work of the office until late 2008.

Following her departure from the office in 2009, her successor, Tam Baillie, has embarked on a large-scale consultation and awareness-raising exercise that seeks children's and young people's views on their rights and the matters that affect them. This effort is being facilitated through the engagement of schools and children's and youth organizations. The consultation findings will inform the commissioner's office's forward work plan until 2015. Alongside this will be an analysis of children's rights work undertaken by others, the UN Committee's 2008 *Concluding Observations*<sup>14</sup> on the United Kingdom's third and fourth periodic state party report, and the Scottish Government's children's rights action plan, *Do the Right Thing*.<sup>15</sup> The consultation with children and young people, combined with the analysis of policy, will provide a basis from which to influence national and local government agencies to take responsibility for the advancement of children's and young people's rights within their respective spheres of influence.

What follows are three examples of work that has been undertaken by the commissioner's office to date – examples that illustrate the range of activities and projects the office is involved in. It is worth noting that the office's work has been varied in two ways. First, the choice of issues has varied. Some are issues affecting or potentially affecting all children and groups of children, such as school closures or play and leisure opportunities, while others have been specifically about minority groups of children, such as the children of prisoners or children seeking asylum.

Second, the work has varied in terms of the types of activities involved, and has included research, influencing national and local decision makers, and advising on policy and legislation on a wide range of issues affecting children and young people. It has led to the creation of tools for other organizations to use to improve their children's rights practices, such as the office's internationally acclaimed Children's Rights Impact Assessment<sup>16</sup> tool. In other instances it has added to the profile of rights issues that others are working on, such as promoting a strategic approach to the right to play, or a mainstreaming program aiming to make

service providers more aware of the rights and needs of lesbian, gay, bisexual, and transgender young people.

### **Not Seen, Not Heard, Not Guilty: Children of Prisoners**

As a direct result of meeting a child at an event who shared with the then commissioner the child's personal experience of a parent's imprisonment, the commissioner's office began to explore the issue more widely, and found that every year in Scotland more children are affected by parental imprisonment – an estimated 16,500 children – than by divorce, and that the cost in terms of children's health and well-being, development, and future prospects can be very significant.

The commissioner undertook desk research, prison visits, and interviews with professionals working in the prison and social work systems, and through a family support organization engaged with children who had experienced the incarceration of a parent. In 2008, the office published *Not Seen, Not Heard, Not Guilty: The Rights and Status of Children of the Prisoners in Scotland*,<sup>17</sup> in which the commissioner argued that the children of prisoners are the invisible victims of crime and of the penal system, with their voices silenced by the shame and stigma associated with imprisonment, and their needs often unmet by mainstream children's services. The report made 28 recommendations that aimed to promote respect for these children and their rights by making changes to relevant legislation, improving policies and practices across the prison estate, and enhancing support for the children of offenders.

The commissioner subsequently commissioned a small research project focusing on children's experiences of parental imprisonment, consisting of an international literature review and interviews with children and their carers. The report, published by the office in early 2010, revealed the traumatic and damaging impact that parental imprisonment can have on children, including post-traumatic stress, developmental and mental health problems, and a higher likelihood of displaying aggressive or disruptive behavior and becoming offenders themselves.<sup>18</sup>

Although a follow-up report examining the progress made on the recommendations by the addressees, largely the Scottish Government and the Scottish Prison Service (SPS), is scheduled for publication in early 2011, it is already clear that the original report had a significant impact, particularly on the SPS's policies and practices. For example, a Children and Families Strategy was devised, national and local children and families groups set up, visiting arrangements changed to enable better contact between imprisoned parents and their children, visiting facilities improved, and transport plans amended. Furthermore, the issue has enjoyed a sustained high profile in the Parliament, among relevant Government officials, and in the media, although as one might expect the nature of the coverage received by this work has been varied.

While the full extent and the impact of those changes cannot be fully appreciated ahead of the forthcoming full review, it is clear that significant progress has been made; the strength of the commissioner's involvement in this area is that it brings a pervasive children's rights perspective to the topic, allows for work to take place that would be unpopular and "hard to sell" for many other organizations, and gives the commissioner an opportunity to speak out with authority on a children's rights issue that might not otherwise have been tackled.

### Young People's Health Advisory Group

This partnership project with National Health Service (NHS) Education for Scotland, a branch of the Scottish healthcare system, brought together a group of young people aged 14–21 to explore ways to improve age-appropriate healthcare policy and give young people a say in the way health services are delivered.

Taking children's and young people's right to be heard in decisions that affect their lives (as stated in Article 12 of the CRC) as a starting point, the Young People's Health Advisory Group (YPHAG) developed a model for health agencies to involve children and young people in the design of services, policies, and facilities. Among the group's successes was its prominent involvement in the design of a new children's hospital in Edinburgh, as well as a significant impact on the training and professional development of the healthcare workforce, contributing to a culture shift that puts young people's health needs at center stage. The YPHAG's success also inspired other health bodies in Scotland to look at the participation of children and young people in the running of their services in a new light.

### U.K. Four-Nations Shadow Report to the UN Committee

In 2008, the UN Committee on the Rights of the Child examined the United Kingdom's third and fourth periodic state party report. Since the devolution of significant powers to Northern Ireland, Scotland, and Wales in 1998, the distribution of powers across the different levels of governance has been complex. Children's commissioners' offices had been set up in all four U.K. nations between 2001 and 2005, all with certain responsibilities regarding the monitoring of the United Kingdom's obligations under the CRC.

The decision was taken by all four commissioners that the U.K. offices should submit one coordinated shadow report to the UN Committee that reflected the headline children's rights issues across the four nations, as well as shared concerns. A comprehensive shadow report outlining the state of children's rights in the United Kingdom was submitted<sup>19</sup> and reportedly heavily relied upon by the UN Committee in its examination of the U.K. report and questioning of U.K. and devolved government officials; this was illustrated not least by the substantial overlap between the commissioners' report and the committee's *Concluding Observations*.<sup>20</sup>

Following the publication of the UN Committee's *Concluding Observations*, the commissioner's office was instrumental in securing a debate on its conclusions in the Scottish Parliament, and the commissioner made strong submissions to inform the Scottish Government's subsequently published action plan, *Do the Right Thing*. Both the *Concluding Observations* and *Do the Right Thing*<sup>21</sup> are being used to drive forward better implementation of the CRC in Scotland over the coming years.

## Conclusion

Scotland's example illustrates one of a number of ways to establish an independent national human rights institution specializing in children's and young people's rights under the CRC and other relevant international law. Like any model, the approach chosen by the Scottish Parliament does have its problems, not least the limited capacity of the office and its limited powers in relation to individual complaints, and the novel institutional setup as a public body that reports directly to a parliamentary administration that has not been set up for that purpose.<sup>22</sup>

It does, however, also have significant strengths, as has been demonstrated by the successes of the commissioner's office to date. It gave children and young people in Scotland their own dedicated champion who is independent of government and free to pursue their causes, and who has authority and influence at all levels of government. It has achieved real changes to law, policy, and practice pertaining to children and young people in Scotland, and increased the profile of children's and young people's rights issues among decision makers, the media, and the public. Economically testing times present challenges to the rights and entitlements held by children and young people, particularly those of the weakest in society; in the commissioner's office, Scotland's children and young people have a champion to fight their corner.

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## Notes:

<sup>1</sup> The full text of the CRC is available from the UN's Office of the High Commissioner for Human Rights, at <http://www2.ohchr.org/english/law/crc.htm>.

<sup>2</sup> To date, the Committee has published 12 *General Comments* on a range of issues, including juvenile justice, the role of national human rights institutions, indigenous children's rights under the convention, and others. All *General Comments* are available online at <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

<sup>3</sup> All recent U.K. and Scottish legislation is available online in full text at <http://www.statutelaw.gov.uk>.

<sup>4</sup> Education, Culture and Sport Committee, *Report on Inquiry into the Need for a Children's Commissioner in Scotland*, SP Paper 508, January 14, 2002, <http://www.scottish.parliament.uk/business/committees/historic/education/reports-02/edr02-02-02.htm#02>.

<sup>5</sup> UN Committee on the Rights of the Child, General Comment No. 2: *The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child*, CRC/GC/2002/2, November 15, 2002, [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331ec1dcd23712e20a8c1256c4f0034fd50/\\$FILE/G0245736.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331ec1dcd23712e20a8c1256c4f0034fd50/$FILE/G0245736.pdf).

<sup>6</sup> UN Committee on the Rights of the Child, General Comment No. 2, paragraph 5.

<sup>7</sup> Section 6 (3) of the 2003 Act.

<sup>8</sup> Section 4 (1) and (2) of the 2003 Act.

<sup>9</sup> Sections 5 and 6 of the 2003 Act.

<sup>10</sup> Section 7 of the 2003 Act.

<sup>11</sup> Schedule 2 to the 2003 Act.

<sup>12</sup> *Principles relating to the Status of National Institutions (The Paris Principles)*, UN General Assembly Resolution 48/134, December 20, 1993, <http://www2.ohchr.org/english/law/parisprinciples.htm>.

<sup>13</sup> Section 7 (3) of the 2003 Act.

<sup>14</sup> UN Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 3rd and 4th State Party Report, CRC/C/GBR/CO/4, October 20, 2008, <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>.

<sup>15</sup> Scottish Government, *Do the Right Thing: A Response by the Scottish Government to the 2008 Concluding Observations from the UN Committee on the Rights of the Child*, 2009, <http://www.scotland.gov.uk/Resource/Doc/282927/0085645.pdf>.

<sup>16</sup> Laura Paton and Gillian Munro, *Children's Rights Impact Assessment: The SCCYP Model* (Edinburgh: Scotland's Commissioner for Children and Young People, 2006), [http://www.sccyp.org.uk/admin/04policy/files/spo\\_314437ImpAssessforWEB.pdf](http://www.sccyp.org.uk/admin/04policy/files/spo_314437ImpAssessforWEB.pdf).

<sup>17</sup> Kathleen Marshall, *Not Seen. Not Heard. Not Guilty. The Rights and Status of the Children of Prisoners in Scotland* (Edinburgh: Scotland's Commissioner for Children and Young People, 2008), [http://www.sccyp.org.uk/admin/04policy/files/spo\\_224830Not%20Seen%20Not%20Heard%20Not%20Guilty%20compress.pdf](http://www.sccyp.org.uk/admin/04policy/files/spo_224830Not%20Seen%20Not%20Heard%20Not%20Guilty%20compress.pdf).

<sup>18</sup> Tania Lureiro, *Perspectives of Children and Young People with a Parent in Prison* (Edinburgh: Scotland's Commissioner for Children and Young People and Families Outside, 2010), [http://www.sccyp.org.uk/admin/04policy/files/spo\\_274057Perspectives%20report%20201003.pdf](http://www.sccyp.org.uk/admin/04policy/files/spo_274057Perspectives%20report%20201003.pdf).

<sup>19</sup> *U.K. Children's Commissioners' Report to the UN Committee on the Rights of the Child*, June 2008, [http://www.sccyp.org.uk/UK\\_Childrens\\_Commissioners\\_UN\\_Report.pdf](http://www.sccyp.org.uk/UK_Childrens_Commissioners_UN_Report.pdf).

<sup>20</sup> UN Committee on the Rights of the Child, *Concluding Observations*.

<sup>21</sup> Scottish Government, *Do the Right Thing*.

<sup>22</sup> See Oonagh Gay and Barry K. Winetrobe, *Parliament's Watchdogs: At the Crossroads* (London: Constitution Unit, University College London, 2008). Chapter 3 deals with Scotland's Parliamentary Commissioners.